THE NEED FOR RECONSIDERING THE ROLE OF WORKMEN'S COMPENSATION

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In response to "serious questions" about state workmen's compensation acts, Congress has chartered a special commission to inquire broadly into the adequacy, efficacy, and fairness of their operation and to report by mid-1972.[1] To emerge with meaningful answers, the Commission must first formulate the proper questions. I suggest that the basic threshold question should be: "Are programs to provide income replacement and medical care limited to work-related injury and illness currently justifiable by either policy or practical considerations?" [2] A major element of this issue is that yesterday's reform—workmen's compensation—is a significant part of today's problem. A review of the origins of workmen's compensation acts shows that they took shape in response to the particular exigencies existing at the end of the nineteenth century and in the early twentieth. Unsurprisingly, current and prospective conditions are markedly different. Following a brief historical review, succeeding sections of this discussion will highlight certain discrete difficulties of the present system. At a minimum, the Commission's considerations should resolve these problems; the

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[1] Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 27, 84 Stat. 1616. The unit is titled the National Commission on State Workmen's Compensation Laws. *Id.* § 27(b).

[2] This question is within the Commission's scope of inquiry:

> The purpose of [§ 27] is to authorize an effective study and objective evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.

Id. § 27(a)(2). The 16 specified subjects of study include the interrelationship of workmen's compensation with social security and other public and private insurance programs. *Id.* § 27(d)(1)(O).

An associated aspect of this question not considered in this discussion is whether *individual* state programs are justifiable. The traditional laboratory argument, so appealing as an abstraction, should be investigated to ascertain whether its theoretical potentiality has been realized in any substantial way or whether balkanization merely facilitated domination by local interest groups. Experimentation is possible within otherwise uniform national programs as the very limited but potentially useful demonstration projects with income guarantees suggest. Initiative can be supplied by private reform groups, industry, unions, academics, and local government, as well as by Congress and the federal agencies involved.

The practical disadvantages of 50 separate programs include: confusion over liability in instances involving possible multiple jurisdiction; additional administrative overhead; unseemly competition for industry between restricted-coverage, low-benefit states and broad-coverage, high-benefit states; and difficulty in coordinating 50 programs with related national programs. Each of these militates for giving serious consideration to either national standards or administration, or both.

optimal solution may be a complete restructuring and harmonization of a multitude of income replacement and medical care programs.

I. Design and Origin of the Workmen's Compensation Acts

Most industrial states adopted workmen's compensation acts in the early twentieth century, and the basic pattern took shape during the 1920's. While innumerable details differ, the several workmen's compensation acts share certain major features. They impose upon employers absolute liability for income loss and medical expense caused by work-related injuries or illness and require either employer insurance against such expenses or proof of employer ability to self-insure. In return, the employer is relieved of common law liability based upon fault, and those costs for which he is liable are limited in amount.

The original acts were shaped by common experience and problems and by debates similar throughout both this country and England during the closing decades of the last century and the first decade of this century. Nineteenth century industrialization and commercial growth created numerous new hazards for working people, and older legal norms did not fit the new situations because of the classic employer defenses: recovery required proof of employer negligence, and negligent acts of other employees were not attributable to the employer; the employee, because he received greater pay for higher risk work, assumed the risks of injury involved in work; and any negligence on the employee's part which contributed to his injury barred recovery.

In England and the United States, the first legislative responses to the changed conditions were the enactments of differing versions of an employer liability act eliminating or tempering in varying degrees the three common law defenses, particularly the fellow servant rule, then regarded as the principal hurdle to employee recompense. Almost two decades in England and another decade and more in the United States preceded the realization that the common law defenses comprised but a minor part of the problem and the discovery that the necessity of proving employer negligence constituted the major impediment to employee recovery. But concern over the high rate of serious injury in manufacturing and transportation,[3] the impact upon the injured and their families of uncompensated losses,[4] and dissatisfaction with the delays and unfairness often involved in private litigation eventually led to further efforts at reform.

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[3] *See, e.g.*, Report of the Employers' Liability and Workmen's Compensation Commission, S. Doc. No. 338, 62d Cong., 2d Sess. 22-23 (1912).

[4] *See, e.g.*, G. Campbell, Industrial Accidents and Their Compensation 18-27 (1911).

Indeed, by the end of the first decade of this century, the intense debate over industrial injuries had reached such a consensus that the President of the National Association of Manufacturers opened a volume on the subject with this observation:

> Employers' liability laws have perhaps been the most fruitful source of worry, dissatisfaction and friction to the employers and wage-workers of the United States. It is freely admitted that looking at the subject from the humane, economic and legal viewpoint our present system can be changed, and ought to be changed.[5]

One NAM annual meeting resolved that "an equitable, mutually contributory indemnity system, automatically providing relief for victims of industrial accidents and their dependents, is required to reduce waste, litigation and friction, and to meet the demands of an enlightened nation . . . ." [6] The resulting statutes were designed as a response to the problems raised during those debates.

Quite clearly, workmen's compensation statutes were only intended to provide income for injured manual laborers. The schedules and early statutory emphasis upon extra-hazardous occupations make this limitation quite evident. Only much later did coverage for occupational diseases creep into the laws.[7] The various state acts have been amended and patched so often in response to special situations and small group pressures that they look like crazy quilts, but are neither so colorful nor so comforting.

II. The Causes of Dissatisfaction With Workmen's Compensation

A. *The Changed Setting*

American society has undergone major transformations since the period during which the pattern of workmen's compensation took shape. In 1900 the population was predominantly rural and a large proportion was engaged in farming which itself directly provided subsistence for the usual three-generation household. In 1971 farming occupies only a very small minority of nuclear families, and they specialize in cash crops and products. The bulk of the population now depends

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[5] F. Schwedtman & J. Emery, Accident Prevention and Relief xiii (1911).

[6] *Id.* xiv.

[7] So cautious and limited was this extension of coverage that miner's black lung disease required special federal legislation as late as 1969. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, tit. IV, 83 Stat. 792 (codified at 30 U.S.C. §§ 901-36 (Supp. V, 1970)).

upon wage and salary employment. Thus a far larger segment of the population has entered occupations for which workmen's compensation was designed.

At the same time, the lifestyles of working people have changed: existing to work is no longer the rule. The ten-hour day and six-day week have been superseded by the eight-hour day and five-day week. Paid holidays and vacations further reduce the part of life preempted by work. As a result, the individual worker's exposure to work-related risks has declined while exposure to non-work-related risks has expanded enormously. Additionally, safety engineering has reduced the maiming potential of the workplace,[8] while "private life" is beset by hazards, many, like the automobile, the result of greatly expanded purchasing power.

Concurrently, life expectancy has increased dramatically and a far larger portion of the population lives into the seventh decade of life, due primarily to public health measures and antibiotics. Consequently a much larger proportion of the population experiences degenerative conditions.

B. *The Performance of Workmen's Compensation Programs*

The intricacies of workmen's compensation law now rival those of property and tax law with which only the most expert or most naive feel at ease. Despite yesterday's plan for procedures simple enough to make unnecessary lawyers who earned impressive fees for Employer Liability Act cases, many union lawyers today prefer the known hazards of secondary-boycott injunction proceedings to the miasmal swamps of workmen's compensation proceedings.[9] Neither expert commissions, compulsory insurance, nor absolute liability has eliminated litigation and delays in settlement, although workmen's compensation delays are probably somewhat less serious than those in automobile accident cases.[10]

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[8] Complacency, however, would be inappropriate. Despite the improvements, serious on-the-job injuries remain a significant problem, to which enactment of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, attests.

[9] An associated problem is employee legal counsel. While a few excellent firms specialize in the area, claimant representation may often be undertaken by the marginal lawyer. *See, e.g.*, Gellhorn & Lauer, *Administration of the New York Workmen's Compensation Law, Part II*, 37 N.Y.U.L. REV. 204, 217-22 (1962). Recently expanded opportunities for claimant representation by union-paid lawyers probably will improve performance in this area.

[10] *Compare* L. MACDONALD, CONTROVERTED CASES—NEW YORK STATE WORKMEN'S COMPENSATION 29, 83-84 (1964), *with* Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1127 (1959).

Chief among the shortcomings of workmen's compensation is the appalling gap between the losses sustained and the compensation provided. Earl Cheit's careful analysis indicates that in thirty-six jurisdictions workmen's compensation replaced less than twenty percent of the losses attributable to a worker's death and that in the most serious California disability category, median compensation replaced about one-third of the wage loss.[11] The system is not intended to work that way, but it does, and the immediate reasons are not difficult to find. Although complete restoration of monetary losses is not sought by any statute, all statutes set arbitrary ceilings in terms of benefit duration, money amounts, or non-loss-related formulas. Among the most generous provisions is Connecticut's limit of sixty percent of the state's average manufacturing wage. One analysis has demonstrated that maximum cash benefits fell below the poverty level in thirty-one states.[12] Several states even put limits on medical care payments. And private insurance, which accounts for the bulk of the coverage, does not adjust benefits to reflect cost-of-living increases after the date of injury.

Another shortcoming is high operating costs. Unimposing from the beginning, the ratio of benefit payments, including those for medical care, to premiums paid has declined. The decrease between 1962 and 1969 was from sixty-four percent to fifty-nine percent;[13] the rate of decrease is even more troublesome when federal programs are excluded.[14] Similarly, private insurance benefits amount to roughly half of private insurance premiums paid.[15] Even considering reserve requirements, the fact that a large portion of benefit payments derive from accidents in earlier years, and that some small amount of premium goes to pay for safety engineering, the current performance of workmen's compensation, as the form sheets say, "does not impress."

C. *Work-Relatedness: Impossible Tests and Resulting Distortions*

Absolute liability for work-related injuries and disease is justified on the rationale that productive enterprise sets in motion unavoidable, risk-creating activities. Compensation for the disabilities that do result may be properly regarded as costs of production. Some argue further that market competition penalizes high-accident-rate enterprises, thereby

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[11] E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 109, 182 (1961).

[12] O'Brien, *More Injuries, Less Compensation,* THE AMERICAN FEDERATIONIST, Feb. 1970, at 18, 20.

[13] Skolnik, *Workmen's Compensation Payments and Costs, 1969,* SOC. SEC. BULL., Jan. 1971, at 31, 34.

[14] *Id.*

[15] *Id.*

stimulating accident-preventing activities, because the resulting costs are built into the product price. Ignoring that difficult and dubious theme, the very questionable tests employed in determining work relatedness remain for consideration. The talismanic phrase "accidental injury arising out of and in the course of employment," or something similar, defines workmen's compensation coverage in most states. The three tests thereby imposed are extremely difficult to administer, as Bohlen predicted long ago,[16] and Larson demonstrated more recently.[17] The heart cases epitomize one critical problem among many that cause extensive litigation. In many instances an employee may have a preexisting heart condition. When can it be said that death or disablement due to a cardiac insufficiency is work-related? What amount or kind of work-stress is required for a heart failure by such a person to be compensable? As Larson points out, the medical analysis of such conditions lacks certainty. But, he argues, if the legal analysis is cogent and clear enough, the medical analysis will be less subject to error.[18] Despite his exquisite explication, it is doubtful that legal precision, even if attainable, can overcome the insufficiencies of medical skill.

A further problem is easily illustrated. *A* has a heart condition and *B* does not. They both perform the same kind of strenuous work. *A*'s heart fails but *B*'s does not. Should *A*'s family recover workmen's compensation benefits? The social pressure to provide such benefits is strong and many commissions and courts yield. But does it make economic sense to place financial burdens upon enterprises because they happen to employ cardiac cases? Is that a cost of production properly allocable to that enterprise's products? The desirability of providing employment to those with circulatory or any other deficiencies seems quite clear. Aside from the humanitarian aspects, the savings achieved if such persons do not become public charges benefits the community fisc, which ought therefore insure against the hazards of employment attributable to their special susceptibility to disablement.

The heart cases are but a striking example of the distortions introduced into workmen's compensation by the understandable desire to succor the unfortunate. The unfortunate should not be cut adrift. But if their injuries are charged to workmen's compensation their employment opportunities may shrink. Rather, in order to encourage their employment and allocate costs more equitably and rationally, there

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[16] Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 401, 517 (1912).

[17] Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 441-65 (1967).

[18] *Id.* 468-69.

should be a community contribution to workmen's compensation funds for their compensation and medical care.

D. *The Mismatch: Causes of Disability and Criteria for Compensation*

The Social Security Administration's 1966 *Survey of the Disabled* indicates that seventeen percent of the noninstitutionalized adults between the ages of eighteen and sixty-four, approximately eighteen million people, suffered work limitations from chronic conditions.[19] About one-third of this seventeen percent fell into one of the following categories: "severe" disablement (total disability or unable to work regularly); "occupational" disablement (unable to work at pre-disability occupation or unable to work full time); "secondary" work limitation (able to work full time, regularly, at the pre-disability occupation, but with limitations on the kind or amount of work performable). The principal disabling conditions are circulatory and skeletal disorders, large numbers of which probably do not qualify for workmen's compensation because not work-related. In these and most other chronic conditions, age is a major factor—the older the group, the greater the percentage disabled. The major causes of disability, then, either are congenital or arise from wear and tear, or are a combination of both. Neither cause meets the workmen's compensation accidental-injury test. Yet, only those totally and permanently disabled qualify for social security disability insurance. Thus, large numbers of the seriously disabled fall outside the protection of our two major social insurance disability programs, while stringent definitions of disability and exacting eligibility provisions limit disability benefits of private group pension plans to comparatively few workers.

The resultant lack of coverage raises serious questions about the design of our disability programs. Intense concentration on politically acceptable formulas may have caused a failure to design our programs to meet the real needs of the community.

E. *The Growth of Other Programs; Changes in Public Philosophy*

Workmen's compensation constituted the first form of social insurance and for a considerable period, especially in this country, was the sole such program. It now overlaps and collides with numerous legislated and privately-initiated programs. Since 1950 its coverage has

[19] This paragraph is based upon Haber, *Disability, Work, and Income Maintenance: Prevalence of Disability, 1966*, SOC. SEC. BULL., May 1968, at 14, 14-15.

been exceeded by social security, which insures against death, or rather the accompanying hazard of dependents' loss of support, and total disablement, regardless of work connection. The poor coordination [20] of social security and workmen's compensation benefits bears most heavily on large, low-income families, those with the greatest needs for income replacement.

Income replacement for short-term, non-work-connected disability is mandated in five states by statutes providing compulsory temporary-disability insurance, in railroad employment as part of that industry's unemployment insurance scheme, and in government and much of industry by paid sick leave regardless of cause.

The several statutory schemes are widely supplemented by private employment arrangements, paced by collectively bargained programs. Supplementation is most generous in highly paid employment and is meagre or absent in low-paying employment, where workmen's compensation itself may not apply. The same pattern obtains for private health insurance, although often the poor have poorer health; indeed, poor health is not only a consequence of poverty, it is a frequent cause. Hence illness and injury have a greater adverse impact upon the non-working dependents of low-paid employees than upon those of better-paid workers. The former are relegated to the health services of welfare and medicaid programs, which vary enormously from jurisdiction to jurisdiction.

Many of the anomalies in this diverse scheme of insurance may be traced from the differing philosophies behind each program. Workmen's compensation represented a change in the economy's ability to devote funds to non-income-producing purposes, the willingness of affected segments of the community to allocate funds for those purposes, and the power of the employed segment of the population to commandeer those funds to their purposes. The special claim of those injured in work-related situations was, as noted, that the enterprise set in motion hazards, quite apart from any negligence, which would impair the earning capacity of large numbers to the detriment of themselves and their families. Such losses were arguably costs of production to be borne by the consumers of the products and services.

While generalization is hazardous, and each program and major amendment to it has its own roots, the basis of modern fringe benefits

[20] The Social Security Act, 42 U.S.C. §§ 301-1399 (1964), *as amended*, 42 U.S.C. §§ 301-1399 (Supp. V, 1970), provides that any benefits payable under the Act on account of an individual's previous employment shall be reduced by the extent to which such benefits plus any workmen's compensation benefits exceed 80% of the individual's "average current earnings," subject to a minimum equal to the total such Social Security benefits payable. 42 U.S.C. § 424a (Supp. V, 1970). "Average current earnings" comprise the average monthly wage used for computing Social Security benefits. *Id.* § 424a(a).

and social insurance differs from that just described. Fringe benefits, such as employment-based group pension plans and medical care insurance, are to a great extent the result of the historical accident of World War II and Korean War legal limitations upon cash wages and salaries, from which such assertedly noninflationary fringe benefits were exempt. In addition, the economies of scale of group coverage make it clearly preferable to individual provision of such protection. While not universally agreed upon, labor economists, unions, and dominant groups in Congress regard such fringe benefits as a form of wages. In social insurance, the rationale for new programs has shifted from special claims, such as work-relatedness, to widespread need, as for example with the social security disability program and medicare, and to the desirability of providing such benefits as a matter of right. And now we seem to be in the early stages of debate about how to provide health care for the entire population. While the mode of achievement will be vigorously debated, the goal seems set.

III. Summary of the Case for Reconsidering the Role of Workmen's Compensation

Since the inception of workmen's compensation, a larger proportion of the population has come within the areas of industry and commerce, making administration a massive undertaking. Yet a larger, and often more dangerous, part of employees' lives is spent away from work than at it. Not surprisingly, workmen's compensation has not worked out quite as planned—what does? Litigation, with its attendant delays and costs, has not been eliminated. Benefits replace a distressingly small portion of losses, in part due to the lag in amending formulas as earnings rapidly increase. Additionally, unexpected complexity has caused administration costs of workmen's compensation programs to be shockingly high, possibly the most important consideration of all. This separate system may be counterproductive in the very situations where its impact is quite critical: the seriously disabled with potentially large money claims may be lured, as a byproduct of the litigation system, to resist, often quite unconsciously, rehabilitation efforts. And, whatever may be the purported advantages of a separate system, establishing and maintaining the demarcation between work-related and non-work-related injury and illness often proves impossible, particularly for death or injuries where social pressures for compensation are strong. Due to greater longevity for more people, the great disablers are no longer traumatic injury and diseases associated with hazardous processes, but have become the degenerative conditions, of circulatory and skeletal systems, that accompany aging.

Moreover, today workmen's compensation is one of many public and private programs providing income substitution, medical care, or both, to large segments of the population. The newer programs, notably employment-based medical care for employees and their families, derive not from a concept of employer responsibility but from a combination of historical accident and the obvious cost advantages of group insurance. Although in an earlier day the employer's responsibility was the touchstone of liability, more recently insurance against the common hazards of modern life, on and off the job, has become a convenient form in which to pay part of employee compensation, and social insurance plans are justified more on the need for particular protection than on special justifications for a particular mode of providing it.

It is possible that we are on the threshold of a nationwide system of comprehensive health care whose arrangements, which may have lower costs because unencumbered by restrictive eligibility criteria problems, could obviate separate provisions for workmen's compensation. Unemployment compensation, which generally excludes those unable to work, might deal with income replacement for all short-term disabilities, thereby dispensing with the special machinery of workmen's compensation for the bulk of its cases. Whether the social security disability program, now limited to the most seriously disabled, offers the proper vehicle for what would remain at least merits exploration. These are only the most ambitious possibilities. More modest potentialities for coordination of the workmen's compensation programs with existing and potential programs should be considered. C. Arthur Williams, Jr., has suggested that private insurers devise all-risk coverage for employees and seek legislation making such plans acceptable for workmen's compensation purposes.[21]

So much has changed since the basic design of workmen's compensation was set that current reconsideration of its role requires rationalizing its functions both with those of many existing programs and with those of programs that impend. Creation of the Commission provides the occasion for such a reconsideration.[22] The many claims of ameliorative programs upon scarce resources and scarce personnel make the task imperative.

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[21] C. WILLIAMS, INSURANCE ARRANGEMENTS UNDER WORKMEN'S COMPENSATION 208-10 (1969).

[22] The author is also engaged in such a study, but welcomes the presence of the prestigious commission, which should be able to mobilize the resources and efforts of the many concerned segments of our society.